85-1483

No._____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

BOLESLAVS MAIKOVSKIS,

Petitioner,

-against-

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Does the materiality test in *Chaunt v. United States*, 364 U.S. 350 (1960), apply to false statements in visa applications?

2. If applicable, is the second branch of the *Chaunt* test to be construed as requiring any particular level or degree of probability?

3. Does Section 241(a)(19) of the Immigration and Nationality Act require proof that individuals were persecuted solely because of their political opinions or may political opinions be merely a major or principal factor?

4. Does Section 241(a)(19) of the Immigration and Nationality Act require proof that the alien's own personal motivations and intentions encompass one of the prohibited purposes or is governmental motivation and intent sufficient?

5. Has Petitioner been denied due process of law because the Board of Immigration Appeals, without giving Petitioner any notice, found him deportable under Charge 6, even though before the Immigration Judge the government disclaimed any reliance on the Audrini episode in support of Charge 6 and never pursued that ground before the Board of Immigration Appeals?

List of Parties

Apart from the party named in the caption of this Petition, no other parties were involved in this matter.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The decision of the Immigration Judge is not officially reported and is set forth in Appendix D, pp. 90a-111a.

The decision of the Board of Immigration Appeals is not officially reported and is set forth in Appendix C, pp. 37a-89a.

The decision of the Court of Appeals is officially reported at 773 F.2d 435 (2nd Cir. 1985), and is set forth in Appendix A, pp. 1a-35a.

The decision of the Court of Appeals denying reargument or rehearing *en banc* is set forth in Appendix B, p. 36a.

Jurisdiction

The judgment of the Court of Appeals was entered on September 17, 1985. A timely petition for reargument, with a suggestion for rehearing *en banc*, was denied on November 12, 1985. By order dated January 16, 1986 (per Marshall, *J.*), Petitioner's time to file a petition for a writ of certiorari was extended to and including March 10, 1986.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes Involved

1. The Fifth Amendment to the Constitution of the United States.

2. Section 241(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(1).

3. Section 241(a)(19) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(19).

4. Section 242(b) of the Immigration and Nationality Act, 8 U.S.C. § 1252(b).

Statement of the Case

1. Petitioner is an alien who was born in Latvia on January 21, 1904. He entered the United States on December 22, 1951 under the Displaced Persons Act. He remains a citizen of the Republic of Latvia, which is presently under Soviet occupation.

2. In October of 1965, a man named Boleslavs Maikovskis, presumably the Petitioner, was tried *in absentia* and convicted by the Supreme Court of the Latvian Soviet Socialist Republic. The sentence was "death penalty by shooting."

3. The Immigration and Naturalization Service commenced a deportation proceeding against Petitioner by service of the order to show cause dated October 13,

1976, pursuant to Section 242 of the Immigration and Nationality Act, 8 U.S.C. § 1252, charging that Petitioner was ineligible for a visa under the Displaced Persons Act, but had nevertheless obtained a visa by fraud.

4. On October 30, 1978, Pub. L. 95-549, 92 Stat. 2065, Section 241(a) of the Immigration and Nationality Act was amended by adding subdivision (19), which rendered deportable aliens who persecuted people under the direction of the Nazi Government of Germany. Appendix I, p. 232a.

5. On March 18, 1980, an additional charge of deportability, was lodged against the Petitioner under Section 241(a)(19) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(19). Appendix F, p. 115a.

6. The charges against Petitioner arose from his service as Chief of Police for the Second Precinct of the Rezekne District Police in Latvia during the German occupation. In December of 1941, a Latvian police patrol was fired upon in the Audrini village, which was within the Second Police Precinct. One or more policemen were killed. Soviet guerrillas, or "partisans" as they were then called, took credit for this incident. They apparently slipped away before the village was surrounded upon orders from the German Security Police Chief, Strauch, who also ordered the arrest of all the villagers and burning of the village. Policemen serving under Petitioner in the Second Precinct were obliged to participate in carrying out Strauch's orders to arrest the villagers and burn the village. The Immigration Judge and the Board of Immigration Appeals found that Petitioner participated in the arrest of all the inhabitants of Audrini, and that he subsequently ordered that the village be burned, but neither the Immigration Judge nor the Board of Immigration Appeals sustained the allegations that Petitioner had been involved in persecution and murder of civilians, especially Jews, at Ancupani Hills and other locations in Latvia.

7. On April 28, 1983, the last session of the deportation hearing was held before the Immigration Judge for the purpose of clarifying and consolidating the charges and allegations that had been lodged against the Petitioner. Separate lists of allegations and charges resulted from this session and were then used by the Immigration Judge, Board of Immigration Appeals and Court of Appeals. Government Exhibit 133, Appendix E, pp. 112a-113a; Government Exhibit 134, Appendix F, pp. 114a-116a.

8. By decision dated June 30, 1983, the Immigration Judge terminated the proceeding, having found that none of the consolidated charges had been sustained. Appendix D, pp. 90a-111a.

9. The Office of Special Investigations (OSI) in the Criminal Division of the Department of Justice, which had taken over prosecution of this proceeding from the Immigration and Naturalization Service, appealed to the Board of Immigration Appeals, which reversed the Immigration Judge's decision and by order dated August 14, 1984, sustained charges 1, 2, 4 and 6, and ordered Petitioner deported. It did not rule on charges 3, 5 and 7. Appendix C, pp. 37a-89a.

10. Petitioner appealed to the Court of Appeals, which affirmed the Board of Immigration Appeals decision.

Reasons for Granting the Writ

I

This Court Should Grant Certiorari to Decide the Unresolved Question of What Materiality Test Should Be Applied to Misrepresentations Made During the Visa Procurement Process.

In *Chaunt v. United States*, 364 U.S. 350 (1960), it was held that the government must "show by 'clear, unequivocal, and convincing' evidence either (1) that

facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship," 364 U.S. at 355. *Chaunt,* however, was a denaturalization case involving citizenship petition papers while this is a deportation proceeding involving only the visa application papers.

In *Fedorenko v. United States,* 449 U.S. 490 (1981), at page 509, this Court said:

> [W]e find it unnecessary to resolve the question of whether *Chaunt*'s materiality test also governs false statements in visa applications.

This case presents the question left unresolved in *Fedorenko.*

In this deportation proceeding against Petitioner, the Board of Immigration Appeals did not apply the *Chaunt* test; instead, it articulated its own test thusly:

> In *Matter of S-& B-C-,* 9 I&N Dec. 436 (A.G. 1961), the Attorney General held that a misrepresentation is material if either '(1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded'. In a more recent decision, *Matter of Bosuego,* 17 I&N Dec. 125 (BIA 1979, 1980), this Board refined *Matter of S-& B-C-, supra.* We held that where it is not shown that an alien would have been excludable on the true facts, then the Government must 'show facts possibly justifying denial of a visa or admission to the United States would have likely been uncovered and considered but for the misrepresentation'. If the Government is able to make this showing, then the burden of proof shifts to the alien to establish that "no proper determination of inadmissibility could have been made." Appendix C, p. 71a.

The court below neither approved the Board of Immigration Appeals test nor applied the *Chaunt* test, but rather formulated yet another and different standard:

> We conclude that once it has been shown that the alien made misrepresentations in his visa application, the materiality of the misrepresentations is established where the government shows that disclosure of the concealed information probably would have led to the discovery of facts warranting denial of a visa. Appendix A, p. 13a.

The several Circuits, including the court below, that have considered this question, have concluded that some variation of a "materiality" test is applicable at the visa stage, but have not articulated a consistent rationale for applying it. *United States v. Sheshtawy*, 714 F.2d 1038 (10th Cir. 1983); *United States v. Koziy*, 540 F.Supp. 25 (S.D.Fla. 1982), *aff'd*, 728 F.2d 1314 (11th Cir.), *cert. denied*, ____ U.S. ____, 105 S.Ct. 130, 83 L.Ed.2d 70 (1984); *United States v. Fedorenko*, 597 F.2d 946 (5th Cir. 1979), *aff'd on other grounds*, 449 U.S. 490 (1981); *La Madrid-Peraza v. INS*, 292 F.2d 1297 (9th Cir. 1974); *Kassab v. INS*, 364 F.2d 806 (6th Cir. 1966); *United States v. Riela*, 337 F.2d 986 (3rd Cir. 1964); *Langhammer v. Hamilton*, 295 F.2d 642 (1st Cir. 1961).

Where the government seeks denaturalization it may seek to establish material misrepresentations in documents *other than* the visa; where, however, as here, it seeks *deportation* of one who never became a citizen the only document it can look to is the *visa application.* Because the consequences to both the alien and this country from issuance of a visa are different from the consequences flowing from the granting of citizenship, the factors that are operable in the decision to issue a visa differ from those in the decision to grant citizenship. Based on these differences, it has been asserted that a different standard of materiality ought to apply where deportation of non-naturalized aliens is involved. See, e.g., NOTE, *Denaturalization of Nazi War Criminals*

After Fedorenko, 15 N.Y.U.J. Inter. L. & Pol. 169, 171, 176-94 (1982); NOTE, *United States v. Fedorenko: The Decision and Its Implications on Nazi War Criminals in the United States,* 20 Col. J. Trans. L. 365, 379 (1981); NOTE, *Immigration and Nationality - Denaturalization of War Criminals - Standard of Materiality for Misrepresentations in Visa Applications,* 56 Tulane L. Rev. 773, 783-4 (1982).

An issue of such importance that this Court saw fit to raise it in *Fedorenko,* despite the fact that all of the parties and lower courts had assumed that it was settled (449 U.S. at 508-09), should not be disposed of on the basis of the unconsidered assumptions of other parties and courts. This is particularly so because this issue is going to recur as the more than 300 investigations and prosecutions being pursued by the government, make their way through the courts. See National Law Journal, Nov. 25, 1985, p. 9, Col. 1.

Accordingly, this Court should grant certiorari to decide the unresolved question of what standard of materiality applies to misrepresentations made during the visa procurement process.

II

Regardless of the Materiality Test Adopted, Certiorari Should Also Be Granted to Resolve the Conflict Among the Circuits Concerning the Parameters of the Test.

The Circuits that have grappled with the meaning of the second branch of the *Chaunt* test have reached conflicting conclusions. As matters now stand, naturalized citizenship and permanent residence status is less vulnerable to attack in the Third and Ninth Circuits than it is in the Second Circuit and perhaps other circuits. Compare *United States v. Kowalchuk,* 773 F.2d 448 (3rd Cir. 1985) (en banc) and *Laipenieks v. INS,* 750 F.2d 1427 (9th Cir. 1985), with the decision in the court below in this proceeding and the cases cited in Point I,

supra. In the former the "would" interpretation prevails, while in the latter the "might" view devalues and depreciates the cherished status of naturalized citizenship or resident alien status. Justice Blackmun's fears that the "might" test would dilute the protection established by prior case law (*Fedorenko v. United States, supra*, 449 U.S. 518, 523-6) were echoed in *United States v. Sheshtawy*, 714 F.2d 1038 (10th Cir. 1983).

In view of this confusion, at least one District Court has applied all available tests to reach a determination. *United States v. Kungys*, 571 F.Supp. 1104 (D.N.J. 1983), *appeal pending*, No. 83-5884 (3rd Cir. Dec. 7, 1983).

The outcome of a deportation proceeding ought not depend on the Circuit where an alien resides. Such a situation verges on a denial of equal protection of the laws. The deportation statutes should be uniformly applied and invidious discrimination ought not be practiced.

The meaning of whatever materiality test is adopted is a rather important issue in the orderly and fair administration of our immigration statutes. As the cases show, visa fraud is an old and recurring problem. It affects not only the so-called "Nazi war criminals" now being hunted by the OSI, but also countless routine visitors, permanent resident aliens and naturalized citizens whose visa applications could come under scrutiny.

Whatever test is adopted, it is submitted that it should be read as requiring proof, by clear, unequivocal and convincing evidence, that had the undisclosed facts been known, an investigation would have been conducted and disqualifying facts would have been discovered.

III

This Court Should Grant Certiorari to Resolve the Conflict Among the Circuits Regarding the Issue of Whether the Alien's Personal Motivations and Intentions Should Be Relevant in Deciding Whether He Has Participated in Proscribed Persecution.

Petitioner contended that neither his role, nor the role of the police department of which he was a member, was motivated by the political opinions of the Audrini villagers. Neither the Immigration Judge nor the Board of Immigration Appeals found the contrary. The Board of Immigration Appeals merely held, and the court below agreed, that:

> We conclude (1) that under the proper interpretation of subsection (a)(19), INS was not required to prove Maikovskis's own personal motivation so long as it proved, by clear, unequivocal, and convincing evidence that the persecution of the Audrini villagers, in which Maikovskis participated, was undertaken 'because of' their political opinion; and (2) that under the proper standard of review, the Board's finding that the persecution was undertaken 'because of' the villagers' political opinions must be upheld. Appendix A, p. 19a.

The Court of Appeals for the Ninth Circuit in *Laipenieks v. INS*, 750 F.2d 1427, 1435 (1985), adopted a contrary legal standard and focused upon the specific acts of the individual alien:

> We find the BIA's analysis and conclusion faulty in several respects. First, we note that the BIA's conclusion that the '[Latvian Political Police] assisted and participated in the persecution' of individuals misstates the requirements for deportability. In order to establish deportability under Section 1251(a)(19), the individual must be found to have participated or assisted the organization in persecutorial acts. Thus, the expert testimony

> as to the acts of the [Latvian Political Police] is only helpful to the extent it establishes that the organization may have been involved in acts of persecution because of political beliefs. The government must also prove by clear, convincing and unequivocal evidence that Laipenieks persecuted individuals because of political opinion or at least that Laipenieks' acts led to the persecution of individuals because of political belief.

The foregoing demonstrates a clear conflict between the Circuits on the critical issue of institutional versus individual motivation under Section 241(a)(19).

The Petitioner proposes to argue that, boiled down to its essence, the Second Circuit's view is this: "If you worked for an organization which had among its activities or missions helping the Nazis in combating its enemies, you are deportable under Section 241(a)(19) of the Immigration and Nationality Act, because the Nazis had among their many enemies Jews who were persecuted because of religion and communists who were persecuted because of political opinion. As long as the objective effect of what you did as an individual was useful to the Nazis in their program of persecution, we will not examine your own motives and intent because you will be deemed to have adopted the motives and intent of the Nazis who benefitted from your actions."

Similarly, the Second Circuit's approach lightens the government's burden of proof to the point where the government has hardly any burden at all. The alien no longer has any connection with the "because of" element, since that has been supplanted by the institutional guilt of either the organization in which he served or the Nazi regime in general. The higher up the hierarchical ladder that the analysis is made the easier it is for the government to prove its case. The courts can take judicial notice of the indisputable fact that the Nazi regime in general persecuted people "because of" not only political opinion but also race or religion. When the necessity for

focusing upon the motive and intent of the accused alien is thusly removed, attention can be turned to the activities of the organization of which he was a part and those activities, even if the alien himself did not engage in them, can be shown as assisting the Nazis in carrying out their despicable programs. What the court below has done is remove the necessity for tying the alien to the "because of" element in Section 241(a)(19) of the Immigration and Nationality Act.

The conclusion that Section 241(a)(19) was never intended to be applied to those who lacked the proscribed motivation and intent is further supported by the following statement by Congressman Eilberg, a proponent of the bill:

> [T]he unbelievable terror, destruction, and wholesale murder that took place at the hands of the Nazis should never be forgotten. Rather, that dreadful period in the history of mankind should forever serve as a tragic reminder to all civilized people of the terrible extremes to which an entire nation can be led by *a small, but highly organized group of demented and ruthless leaders.* This bill addresses itself to the members of *that group* - to the perpetrators of the "Holocaust." [124 Cong. Rec. 31,647 (1978); emphasis added.]

In *Artukovic v. INS*, 693 F.2d 894, 896 (9th Cir. 1982), the Court summarized the section as authorizing deportation of:

> [M]embers of Nazi governments of Europe *who* had persecuted people because of their race, religion, national origin, or political opinion. (emphasis added)

Had assistance of a government which engaged in political persecution alone been deemed sufficient to warrant deportation under Section 241(a)(19), the Court would have said: "members of Nazi governments of Europe *which* persecuted people because of their . . .

political opinion . . . ." The use of the word "who" instead of "which" indicates that it is the motivation of the alien that is critical.

The foregoing demonstrates that individual, not governmental or organizational, motivation is the critical issue under Section 241(a)(19). If the individual and governmental motivations were the same, this would be an academic matter. But that is not the case in this proceeding, for the record clearly indicates that Petitioner had a motivation and intent for his acts that was not only different from that of the Nazis, but was also completely legitimate.

The evidence consists of GX24-10, RX91, RX114, TR699-702, TR419-424. The Germans had a vital military interest in preventing guerrilla attacks on major transport arteries such as railroads; especially the main Berlin to Leningrad line (TR423). Guerrilla activity is made more difficult without support from the local people in the countryside. The Germans chose terror as the means of isolating guerrillas from the local villagers. They took great pains to spread the message that the fate of Audrini awaits all who support terrorists. In GX24-10 it was reported:

> This retaliatory measure was made public in the daily papers published in the territory of Latvia in a notice by the commander of the Security Police and Security Service, and by posting 6000 notices with the same text in all the villages of Lettgallen.

The 6,000 notices were posted in the German, Latvian and Russian languages as follows:

> *The Chief of the German Security Police in Latvia herewith lets to be known:*
>
> 1. There has been repeated edict, that all citizens taking part in any activity hostile to the state, will be severely punished and an especially

hard punishment will be inflicted upon these citizens, who shelter undesirable elements in their apartments and houses, supply them with food and arms, and by doing so are breaking the law.

Lately there have been several incidents, proving to me, that the above edict of the German government has been disregarded.

2. In the Rezekne district, the inhabitants of Audrini village for more than a quarter of a year have been harboring members of the Red Army, supplying them with food and arms, and helping them in any way in their actions

Members of Latvian police were sent to fight these elements.

3. This is the punishment. I ordered as a warning:

a. To burn down the Audrini village;
b. To arrest the villagers and;
c. Publicly execute 30 male inhabitants of the Audrini village in the market place of Rezekne. 1.4.1942.

4. Henceforth every person, disregarding the edict, and helping these elements in any way, will be most severely punished.

Chief of the German Security police in Latvia,
Strauch (Signature),
SS Obersturmbannfuhrer

If, as the Court below opined, "the Nazis sought to rid the Rezekne area of Communists" (Appendix A, p. 26a) publicity and notoriety surrounding Audrini was completely contrary to their policy of discreetly and quietly liquidating people.

Judge Newman recognized the existence of this very evidence when he said:

> The whole point of wartime reprisal, offensive as it may be, is to inflict suffering and even death on innocent persons to deter others from future hostile acts out of concern for the plight of innocent victims.
>
> A reasoned explanation could readily be supplied if the evidence showed that in some villages in Nazi-occupied territories retribution for harboring partisans who had shot local collaboraters was normally confined to guilty individuals, with mass reprisal action, such as that taken in Audrini, occurring only in communities with significant political sympathy for Communists or others opposed to the occupying regime. But we have no reason to believe that the BIA views the evidence in this light, and it is far from clear that such a conclusion would be warranted on this record. Appendix A, p. 30a.

As noted in *Schneiderman v. United States*, 320 U.S. 118 (1942):

> [W]here two interpretations of an organization's program are possible, . . . a court . . . is not justified in . . . imputing the reprehensible interpretation to a member of the organization in the absence of overt acts indicating that such was his interpretation. So uncertain a chain of proof does not add up to . . . "clear, unequivocal, and convincing evidence . . . . Id. at 158-59."

Moreover, when the *Laipenieks* and *Maikovskis* disparate decisions in the Circuits are compared, the conflict which surfaces is a clear denial of equal protection of laws by its unequal application of Section 241(a)(19) to persons similarly situated. As the Supreme Court noted in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886):

> Our Constitution and our civil rights acts have guaranteed to aliens equal protection of the law (which) is a pledge of equal laws.

This Court also pointed out in 1894 in *Duncan v. Missouri*, 152 U.S. 377 (1894), a fundamental principle involved in classification requires that the law affect all persons in the same class under similar circumstances alike.

IV

This Court Should Grant Certiorari to Resolve the Conflict Among the Circuits Regarding the Issue of Single Versus Multiple Motivations for Persecution.

Section 241(a)(19) of the Immigration and Nationality Act proscribes ". . . persecution of any person because of . . . political opinion," but does not provide any guidance for resolving situations where the conduct alleged to constitute persecution is triggered or motivated only in part by political opinion.

The Court of Appeals for the Ninth Circuit addressed this question in *Laipenieks v. INS*, 750 F.2d 1427 (9th Cir. 1985):

> Laipenieks and the [Latvian Political Police] had a legitimate basis for investigating Communists. The Communists remaining in Latvia were sympathetic to a hostile nation who was presently at war with the Latvians and who only a few months earlier had exterminated thousands of Latvian citizens. In light of the potentially legitimate basis for investigating "Communists" at the time in question, we believe it incumbent on the government to establish clearly and convincingly that individuals were persecuted *solely* because of their political opinion. *Id.* at 1436-37. (emphasis added)

The court below came to a different conclusion:

> Even if the Board's decision may be read as finding that the Audrini incident was in part a result of the earlier killing of the two policemen, it is clear that the Board concluded that political opinion was the *principal motivating factor* in the persecution. Since we see no basis in the statute for requiring that the government prove that political opinion was the sole motivation for the persecution, and since we conclude that there was adequate support for the finding that the villagers' political opinions were at least a *major motivation* for the persecution, we reject Maikovskis's contention that the earlier killing of the two Latvian policemen meant that the mass arrests and wholesale arson did not occur 'because of' political opinion. (emphasis added) Appendix A, pp. 25a-26a.

This single versus dual motivation issue is not unique to this deportation proceeding. It was hotly contested in the *Laipenicks* proceeding and no doubt will keep recurring. This Court should consider it and decide what test must be applied in deciding the gravity of the political motivation that should trigger deportation.

V

The Board of Immigration Appeals' *Sua Sponte* Resurrection of the Audrini Episode as Grounds for Deportation Under Charge 6 Denied Petitioner Due Process.

Petitioner was never notified that the Board of Immigration Appeals would consider finding him deportable on Charge 6 based on the Audrini episode.

Before the Immigration Judge, the government relied exclusively on Petitioner's alleged involvement in the Ancupani Hills matter to establish Charge 6 under Section 241(a)(19). At the April 28, 1983 session before the Immigration Judge, the government made it crystal

clear that it was *not* relying on allegations 11, 12 and 13 (relating to the Audrini episode) to prove Charge 6 (Appendix A, p. 16a). This concession by the government was reflected in the Immigration Judge's "Reference Chart" in which he specifically noted that Charge 6 was based solely on allegations 14 through 16 relating to the executions in the Ancupani Hills. Appendix D, p. 111a.

In its brief before the Board of Immigration Appeals, the government completely abandoned *any* reliance on Charge 6 as a basis for deportation. It relied exclusively on the other charges under the Displaced Persons Act as grounds for deportability. See Section III of its brief, entitled "Grounds for Appeal," pages 3 to 5:

> b. Respondent was ineligible to enter the United States under the *Displaced Persons Act* because of his participation in the arrest of all of the Audrini villagers and the wanton burning of the entire village. (Emphasis supplied)

The Petitioner took the government at its word and on page 3 of his brief to the Board of Immigration Appeals, recited the issues raised by the government and stated for the record: "[Petitioner] shall assume that these are the only errors relied upon by the government and shall address them accordingly." The Board of Immigration Appeals ignored the government's position, disregarded the absence of any allegations tying the Audrini incident to Charge 6, and proceeded under its own theory.

The majority in the court below concluded that "we are unable to conclude that Maikovskis lacked notice at any meaningful stage that the Audrini incident would be a basis for deportation under subsection (a)(19), and we see no prejudice to Maikovskis from the INS disclaimer at the 1983 conference." Appendix A, p. 19a.

The dissent of Judge Newman accurately summarizes Petitioner's response thusly:

> Maikovskis is *not* contending that he lacked a fair chance to present evidence [before the Immigration Judge]; his point is that, after prevailing before the Immigration Judge, he lacked a fair chance to persuade the *BIA*, on the government's appeal, that the administrative record does not support a finding by the requisite standard of proof . . . that the Audrini episode was based on political motivation sufficient to satisfy Section 241(a)(19). That opportunity was foreclosed by the Government's action, first, in disclaiming any reliance on the Audrini episode in support of Charge VI, and, second, in pursuing the appeal to the BIA without any mention that the Audrini episode was being reclaimed as a basis for deportation under Section 241(a)(19).
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> * * * * *
>
> Unless appellate advocacy, whether before judicial or administrative tribunals, is to be deemed worthless, what happened in this case denied Maikovskis a significant opportunity to present his side of the dual motivation issue, a matter, as I have indicated above, that is exceedingly troublesome. This is not simply a case where an agency has relied on a fact adequately supported by the record though not particularly emphasized by the Government during the process of administrative appeal. Here the key issue of political motivation was explicitly taken out of the case by the government's disclaimer before the Immigration Judge and kept out of the case on the appeal to the BIA. (emphasis added) Appendix A, p. 34a.

The essential ingredients of procedural due process are guaranteed to the alien under Section 242(b) of the Immigration and Nationality Act, 8 U.S.C. § 1252(b). Those safeguards include "notice, reasonable under all the circumstances, of the nature of the charges"; and the regulations which embody those procedural requirements are binding upon the Board of Immigration Appeals,

since "the procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section." The Board of Immigration Appeals itself has recognized that "sufficient notice . . . and an opportunity to prepare a defense to deportation is a basic procedural right." *Matter of Samai*, 17 I&N Dec. 242 (Board of Immigration Appeals 1980). The Board of Immigration Appeals is required to make "a scrupulous effort to follow procedures" designed to afford the Petitioner due process. *Attoh v. INS*, 606 F.2d 1273 (D.C.Cir. 1979). Petitioner submits that the Board of Immigration Appeals denied him those procedural safeguards.

It is wholly improper for a party to shift its position on appeal and raise a matter or argument either abandoned or not raised below. See, e.g., *United States v. Knuckles*, 581 F.2d 305, 310 (2nd Cir. 1978). Perhaps of greater importance, it is "manifestly unfair" as well as a deprivation of the "most basic notion of due process" for an appellate court or agency to decide an appeal on a theory not relied on, and, in fact, explicitly abandoned, below. *Dunn v. United States*, 442 U.S. 100, 106-07 (1979); *United States v. San Juan*, 545 F.2d 314, 318-19 (2nd Cir. 1976).

The Board of Immigration Appeals' conclusion that Petitioner is deportable under Charge 6, is devastating. It is tantamount to a death sentence. A finding of deportability under Section 241(a)(19) precludes Petitioner from being eligible for *any* discretionary relief as noted by the Board of Immigration Appeals. Appendix C, pp. 86a-88a.

It is not idle rhetoric to claim that the Board of Immigration Appeals' conclusion is tantamount to a death sentence. A man named Boleslavs Maikovskis, alleged to be the Petitioner in this proceeding, was tried and convicted *in absentia* in October, 1965 by the Supreme Court of the Latvian Soviet Socialist Republic. Boleslavs Maikovskis was sentenced to "death penalty

by shooting.[5] Since the government has stated for the record in other proceedings its desire to deport persons similarly situated to the Petitioner to the Soviet Union (see, e.g., *Linnas v. Immigration & Naturalization Service*, 2nd Cir., No. 85-4163), death by firing squad is what the Petitioner must look forward to if deportability under Charge 6 is sustained.

Conclusion

For the above stated reasons, the petition for a writ of certiorari should be granted and the judgment of the Court of Appeals reversed.

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Respectfully submitted,

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